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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 39

ENRIQUE PEREZ,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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Opinion Below

The opinion of the Supreme Court of the State of California is reported in 65 Cal. 2d 615, 55 Cal. Rptr. 909, 422 P2d 597, and it appears in Appendix A, pages A-23 to A-35. The opinion of the Fifth Appellate District, State of California, is reported in 51 Cal. Rptr. 11, and which was vacated by the California Supreme Court, Appendix A, pages A-11 to A-22.

Jurisdiction

The judgment of the Supreme Court of the State of California was entered on January 27, 1967. It became final on February 27, 1967. A Petition for Writ of Certiorari to the Supreme Court of the State of California was duly filed in this Court. Said Petition was No. 65 Misc., October Term, 1966. This Court granted the Petition on March 4, 1968, transferred the case to the appellate docket and placed the case on the summary calendar. The case was assigned No. 1194, October Term, 1967. The petitioner had filed coincidentally with the Writ of Certiorari a Motion for Leave to Proceed in Forma Pauperis and this Court granted said motion. The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1257(3) and the Fifth and Fourteenth Amendments to the United States Constitution. The constitutional questions were raised originally at the Trial Court and assigned as error to the District Court of Appeal and to the Supreme Court of California.

Constitutional Provisions Involved

The constitutional provisions involved are the Fifth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States is as follows:

"Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use; without just compensation."

The Fourteenth Amendment to the Constitution of the United States is as follows:

"Amendment XIV

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, including Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or in the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged,

except for participation in rebellion, or other crime, the basis of representation therein shall be reduced to the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Question Presented

Was the defendant deprived of his privilege against self-incrimination when the highest Court of California allowed the prosecutor to comment and the trial judge to give instructions on the defendant's failure to explain or deny two robberies charged in a four-count information after the defendant took the stand to deny the other two robberies charged?

Statement of the Case

On February 16, 1965, the District Attorney of the County of Sacramento filed an Information against appellant, ENRIQUE PEREZ, and defendant, DAVID PEREZ. The Information charged the petitioner with felonies, to wit: The crime of robbery in four counts. Count No. 1 with robbery from FRED FAUBLE of personal property belonging to the Viking Club on January 3, 1965; Count No. 2 with robbery from JAMES MONAHAN of personal property belonging to the Corner Market on January 15, 1965; Count No. 3 with robbery from RAY BINER of personal property belonging to Ralph's Bar on January 13, 1965; Count No. 4 with robbery from ELI DRAGASH of personal property belonging to ELI DRAGASH on January 13, 1965 (CT 8-9). The Information further charged the petitioner with two prior convictions of felonies as to each count of the Information, to wit: First, Robbery in the First Degree in judgment pronounced on March 5, 1962 in the County of Sacramento. Second, Robbery in the First Degree in judgment pronounced on March 5, 1962 in the County of Sacramento (CT 9-10).

Petitioner was tried by jury on April 13, 14, 15, 16 and 19, Judge William M. Gallagher presiding (CT 15, 16, 17, 18, 19, 20, 21, 22, 23). The jury returned a verdict of guilty as to each of the four counts.

The Court sentenced petitioner to State Prison for the term prescribed by law for the crime of Robbery of the First Degree (CT 26). Counts one and two to run consecutively and counts three and four concurrently (CT 25).

On May 10, 1965, the petitioner filed with the Clerk of the Superior Court of Sacramento County a Notice of Appeal from the final judgment and sentence (CT 27). On May 10, 1965, the petitioner filed a request for additional records (CT 29-30).

The judgment and sentence as stated in CT 25-26 and as stated above is correct and appears in the minute orders. The "term prescribed by law" as indicated in CT 26 is incorrect and does not reflect the minute order in the case.

The judgment was affirmed by the California Supreme Court in *People* v. *Perez,* 65 Cal. 2d 615, 55 Cal. Rptr. 909, 422 P2d 597 (A-23 to A-35).

At the trial the petitioner was charged and convicted of four counts of armed robbery. The petitioner took the stand in his own defense and testified as to only the first two robberies charged in the first two counts. He did not testify as to counts three and four which were separate incidents. The prosecutor in his closing argument to the jury, over the objections of petitioner's counsel, made reference to the fact that the petitioner had not testified or explained counts three and four. The Court gave the jury the same instruction which was used and disallowed in *Griffin* v. *State of California,* 380 U.S. 609 (RT 524) (Foot-

note 1, *People* v. *Perez*, 65 Cal. 2d 615). The facts as to each of the four counts charged in the Information are contained in the California Supreme Court's opinion and are as follows:

"Count 1 (January 3, 1965, robbery at the Viking Club):

"About 9 p.m. on January 3, 1965, two men entered the Viking Club in Sacramento. One of them was armed with a revolver and had a glove over his mouth. After informing the bartender, FREDERICK FAUBLE, that this was a holdup, the robbers took $325, a Bankamericard, and a Shell credit card. Defendant's fingerprints were found on a cigar box that was knocked off a shelf by one of the robbers.

"Defendant admitted using the stolen Bankamericard to make various purchases and signing Fauble's name to the sales slips. He testified that one Robert Gomes gave him the card in early January after trying to sell it to him. Defendant denied having been in the Viking Club on the night of the robbery and testified that he was with his brother, Miguel, and a friend, Joseph Rosales, when the robbery was committed. His alibi was supported by testimony of Miguel and Mrs. Joseph Rosales.

"Count 2 (January 15, 1965, robbery at the Corner Market):

"About 7 p.m. on January 15, 1965, David Perez (who is not a relative of defendant) and a second man entered the Corner Market in Sacramento. Each man carried a gun and held a glove or cloth over his face covering his nose and mouth. The men demanded money from Mr. and Mrs. James Monahan, who operated the store, and took from

them about $69 and a radio. Mr. and Mrs. Monahan identified defendart at the trial as the second robber. They had a momentary full face view of him on one occasion during the robbery when he dropped the covering from his face.

"Defendant testified that he was at home when the Monahans were robbed, and his alibi was supported by testimony of his brother Miguel and his mother.

"Counts 3 and 4 (Janudry 13, 1965, robberies at Ralph's Bar):

"About 1:15 a.m. on January 13, 1965, David Perez and two other men entered Ralph's Bar, which was in the same general neighborhood as the Corner Market. One of the men carried a revolver. David Perez wore a mask, and one of his companions used a handkerchief as a mask. Ray Biner, the bartender, and Eli Dragash, a patron who was partially blind, were in the bar. The robbers took $6 from Dragash and the money in the cash register. Biner and Dragash were unable to see the faces of the men who accompanied David Perez but described the height and weight of one of his companions, and the jury, of course, had an opportunity to observe the defendant.

"Defendant was with David Perez at the apartment of David's sister, Sylvia Moreno, about three blocks from Ralph's Bar at 1 or 1:30 a.m. on January 13, 1965, which was just before or after the robbery at that bar. The weapon used by defendant at the Corner Market robbery, clothing worn by him at that robbery, the stolen radio, and a coat worn by one of David Perez's companions at the Ralph's Bar robberies were found at Mrs. Moreno's apartment.

"Prior Collateral Robbery

"At 6:45 p.m. on November 10, 1964, two men entered the Modern Variety Store in Sacramento. Both wore stockings that covered their faces, and one carried a rifle. William George, the owner of the store, was working there that evening. The robbers took currency from the cash register, money orders and a check protector. Some of the stolen money orders were later negotiated.

"Items stolen in the Modern Variety Store robbery were left by defendant and one David Hunt at the home of an acquaintance. Defendant stated at that time that they got the items in a holdup in Sacramento.

"Defendant objected at the trial to the admission of the prior robbery, and the trial court, before admitting the evidence, held proceedings outside the jury's presence at which the Court was informed what evidence would be introduced and heard arguments on the matter."

David Perez, it should be noted, was not related to the petitioner (RT 353). The various comments by the prosecutor and the objections raised during the trial by defense counsel will be referred to throughout the argument that follows.

Judge Peters of the California Supreme Court in a Dissenting and Concurring Opinion summarizes the facts in a manner which spotlights the questions presented in this case:

"Defendant was charged in the first count with a robbery at the Viking Club, in count 2 with a robbery at the Corner Market and in counts 3 and 4 with robbing the bartender and a patron of Ralph's Bar. He took the stand

and denied commission of the Viking Club and Corner Market robberies. He did not testify on direct examination with regard to the robberies charged in counts 3 and 4. When the prosecutor asked on cross-examination a question regarding the robberies charged in counts 3 and 4, the trial court sustained an objection on the ground that the question was beyond the scope of the direct examination.

"In his closing argument, the prosecutor commented on defendant's failure to explain or deny the evidence of his guilt as to counts 3 and 4. The trial court gave an instruction permitting the jury to draw an inference adverse to defendant from his failure to explain or deny facts within his knowledge."

ARGUMENT

The Petitioner Was Deprived of His Privilege Against Self-Incrimination When the Highest Court of California Allowed the Prosecutor to Comment and the Trial Judge to Give Instructions on the Petitioner's Failure to Explain or Deny Two Robberies Charged in a Four-Count Information After the Petitioner Took the Stand to Deny the Other Two Robberies Charged.

1. The Comment and Instructions and Their Prejudicial Effect.

The petitioner in this case at bar took the stand to testify in his own defense regarding certain counts. Prior to the recent case of *Griffin* v. *State of California,* 14 L.Ed.2d 102, 85 S. Ct. 1229, 380 U.S. 609 (1965), prosecutors in state Courts could comment on the failure of the defendant to testify and the Courts invariably issued instructions to the

effect that the jury could draw unfavorable inferences from the defendant's failure to testify. *Griffin* v. *State of California, supra,* held that a comment by the prosecutor on the accused's silence or instructions of the Court that from such silence inferences of guilt could be drawn violated the Fifth Amendment of the U.S. Constitution and the privilege against self-incrimination. *Malloy* v. *Hogan,* 378 U.S. 1, 845 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), had previously decided that the privilege against self-incrimination applied against state action on the basis that it was protected by the due process clause of the Fourteenth Amendment of the United States Constitution. In the *Griffin* case, *supra,* the judgment was reversed but it was not clear if every comment or instruction would be per se tantamount to reversal. The California Constitution, Article 6, Sec. 4½ allowed such comment and instructions. *Griffin, supra,* did not make it clear if Article 6, Sec. 4½ in its entirety violated the U.S. Constitution. The California Supreme Court in *People* v. *Bostic,* 44 Cal. Rptr. 649, 62 AC 869, 402 P.2d 529 (1965) held that the comments and instruction and Article VI, Sec. 4½ per se were not unconstitutional and required a reversal, but reversal would be ordered only when a miscarriage of justice had occurred due to such comment or instruction. The Court said at page 651:

> "Such error, unless it resulted in a miscarriage of justice, does not, however, automatically require a reversal if Article VI, Section 4½ of our Constitution is applicable to it . . ."

In the *Bostic* case, *supra,* the California Supreme Court did not go into the factual questions of whether there was such a close question of guilt that the comments and instructions were the deciding factor because the Court de-

cided that the judgment had to be reversed on other grounds. The Court did not actually examine the facts to determine whether or not there was a miscarriage of justice, but it did lay down the ground rules and criterion. In *Bostic, supra,* the Court further said that either comment by the prosecutor or an improper instruction *each* constituted error. At page 650 the Court said:

> "It follows, therefore, that the comment of the prosecutor and the trial court's instruction herein *each* constituted error." (emphasis added)

In the case at bar, both errors occurred. First, the prosecutor commented several times on the failure of the appellant to testify as to all counts and the Judge instructed the jury on the inferences to be drawn from the failure to testify.

First, the prosecutor's comments on the failure to testify can be seen on page RT 457 where the defense counsel objected to the questioning. The comment is as follows beginning on line 13, page 457 and ending on line 1 of page 458:

> "'Why didn't Mr. Noland ask him that?' Well, the law restricts me on what I can ask him. If he doesn't mention it on cross-examination, I can't—I mean, on direct examination—
>
> Mr. Carroll: (Interposing) Your Honor, I would object.
>
> Mr. Noland: I can't get it on cross-examination.
>
> Mr. Carroll: I would object to this line of argument. I believe that is a comment that is far beyond—the State of California makes the exception in the recent case of Modesto.

The Court: You will restrict your comment, counsel, to within the law, and—however, he may make comment on the facts in evidence in this case, and on the evidence that was elicited, and that which was not elicited is not fair comment.

Mr. Carroll: I realize that, your Honor.

The Court: All right. Proceed."

The Court failed to strike the comment or admonish the jury to disregard it and failed to rule on the objection except to instruct the attorneys and tell them to proceed.

On page 461 line 1 to page 462 line 17 the prosecutor again makes reference after reference to the fact that the appellant failed to explain or to testify to certain facts. This argument by the prosecutor is as follows:

"They were together minutes after the Ralph's robbery at the place where all of these items, paraphernalia that were used in the robbery were found, and in spite of this the defendant doesn't say a word about it on the stand. He won't explain it to you. So Sylvia Moreno's testimony stands unexplained and uncontradicted, and as I have already told you, I cannot cross-examine because he chose to sit silent. The same as if he did not take the stand on that particular count. But the Court will instruct you that you may consider those things that you feel that he should have given an explanation to, you may consider that in weighing the evidence—the testimony as to whether it is more probable that he was telling the truth, or Sylvia Moreno is telling the truth about them being together, or the conclusions that you can deduct therefrom that are either favorable or unfavorable to him.

So let's do it again. Sylvia Moreno puts them together after the Ralph's Market (sic). Not just out in the street somewhere, but together where two days later the officers found all of this robbery equipment. Guns, hats, coats, and things, and the defendant doesn't chose to talk about it on the stand or give you any explanation.

Now, ladies and gentlemen, the defendant has admitted to you that—he only tells you what he wants you to know. He said that on the stand. He says, 'I don't talk about the forgeries. I didn't tell the police about the forgeries. I didn't want them to know about the forgeries.' There are objections to them coming into evidence here. Objection to the license number and that evidence, and all these things come in over strenuous objections, and I'm trying to fight all the way. Anyway, they are put before you in spite of these objections. Oh, he says, 'Yes, I admit those.' He selects what he wants to testify about on the stand, to give you only half of the story, or part of the story. He won't tell you all the story there. He has been convicted of an armed robbery before, which the Court will instruct you does haye bearing (sic). If you—in other words, you may consider that as to whether or not you believe anything he says, the fact that he has a prior conviction. So I say that you cannot believe what he has told you at all because of his selective testifying. His admitting to you that he tells you only what he wants you to know, and the fact that he has this prior conviction."

The second error committed concerns the instruction given by the Court. In RT page 524 line 16 to RT 525 line

11 the Court gives the very same instruction which was condemned in *Griffin, supra,* as error. The instructions given in this case are as follows:

> ". . . It is a constitutional right of a defendant in a criminal trial that he may not be compelled to testify. Thus, whether or not he does testify rests entirely in his own decision. As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable. In this connection, however, it should be noted that if a defendant does not have the knowledge that he would need to deny or to explain any certain evidence against him, it would be unreasonable to draw an inference unfavorable to him because of his failure to deny or explain such evidence. The failure of a defendant to deny or explain evidence against him does not create a presumption of guilt or by itself warrant an inference of guilt, nor does it relieve the prosecution of its burden of proving every essential element of the crime and the guilt of the defendant beyond a reasonable doubt."

Although the text of *Griffin* case, *supra,* does not quote the instruction given, a recent California case, *People* v. *Keller,* 44 Cal. Rptr. 432, 234 ACA 460 (1st Dist. 1965) does recite the *Griffin* instruction in footnote No. 1 at page 431. The instructions, therefore, in *Griffin, supra, Keller,*

supra, and the case at bar are identical. It was therefore error for the Court to give the instruction. From the record it is unclear who requested the instruction. A similar situation was recently presented in *People* v. *Collier*, 44 Cal. Rptr. 465, 234 ACA 675 (4th Dist. 1965). In that case the Court reversed the decision solely on the basis of the improper instruction. The Court held that it was unclear whether the instructions were requested by the defendants or prosecution but that the Court could not speculate on whether the error was invited. The Court in *Collier, supra*, further supports *Bostic, supra*, directly by saying on page 469:

> "The sweep of Griffin, as indicated by the language quoted is so broad as to apply, even though the District Attorney may not have commented on the defendant's failure to testify."

It is therefore clear that two distinct errors were committed in the case relating to the failure of the appellant to testify. In order for a reversal to be ordered this error must be prejudicial, according to the *Bostic* case, *supra*. This can be determined only by a review of all the evidence in the case to determine how close a question the appellant's guilt was as to each distinct count. It is appellant's contention that since the prosecution committed such confusion in the case that all counts became lumped together and it is impossible to tell what effect the comments of the prosecution and the Court's instruction played in the jury's deliberations.

The prosecution in the case at bar scattered confusion from the beginning. Several examples of this can be seen in the number of witnesses produced by the prosecution

on the point of the use of stolen credit cards in count one. Eight witnesses were used to prove what has to be regarded a minor link in the chain of evidence. Other things which happened in trial which undoubtedly caused confusion in the jury's minds was the unexplained relationship of Henry Perez, the appellant, and David Perez. Midway in the trial one juror commented in Court that she thought the Perezs were brothers and asked the Court if that was not true (RT 280-281). Further showing of the confused state of the evidence was the description of the robbers given by Mr. Dragish, the victim of count 4. Mr. Dragish admitted he was almost totally blind (RT 58) but gave the most vivid description in the trial, including a comment that his assailant was armed with "a .38 revolver with a six inch barrel" (RT 59). This case saw a prosecution witness identify the defense attorney as purchasing merchandise and using a stolen credit card (RT 96) and the jury saw the appellant's shoes removed and entered into evidence (RT 73). All of the aforesaid were permissible and any objection raised in appeal would normally be categorized as ludicrous since these objections don't normally go to the sufficiency of the evidence but to its weight. But the appellant submits that in the case at bar the totality of these events caused the various counts and issues before the jury to be blurred and rendered the jury's verdicts a miscarriage of justice.

In *People* v. *Keller, supra,* 44 Cal. Rptr. 432, 234 ACA 460, the Court did reverse the judgments after reviewing the evidence. In *Keller, supra,* the evidence produced by the prosecution was substantially greater than in the case at bar as to each and every distinct count. It is not necessary that an Appellate Court determine that a jury could

not convict the appellant without the comment and instruction errors but only that it is reasonably probable that a different verdict would have been reached. This is not the same type of review as is necessary to the Appellate Court in reversing a judgment for insufficiency of the evidence. In the latter, the appellant concedes that the Appellate Court would have to determine that not a sufficient amount of evidence was produced for any jury to find the defendant guilty beyond a reasonable doubt. This is the argument raised by item C herein by the appellant. However, the appellant asks for a reversal on the basis of the improper comment and instruction because it is reasonably probable that a different verdict would have been reached without the comment or instruction. In *Keller, supra,* p. 435, the Court said:

> "After reviewing the entire case, including the evidence, we are of the opinion that it is reasonably probable that a result more favorable to defendant would have been reached in the absence of the error arising from the argument of the prosecution and the giving of the instruction on the subject of defendant's failure to testify. It is therefore necessary to reverse the judgment."

The question of guilt in the case at bar was so close according to the evidence produced at this trial compared to the *Keller* case, *supra,* that no other conclusion can be reached but that it is reasonably probable that a more favorable result would have been reached if either of the cited errors had not been made. Therefore, appellant respectfully submits that either one of the errors was prejudicial to the verdicts as to each count and to the judgment.

2. THE COMMENT AND INSTRUCTIONS IN MULTI-COUNT TRIALS.

Griffin v. *The State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106, certainly expresses the reasons why the prosecution should not comment on the failure to testify and why the jury's attention should not be drawn to this fact by an instruction of the judge. The petitioner contends that the comment and instruction which violates the Fifth Amendment privilege against self-incrimination does just as much harm to the petitioner when used at separate trials or when used in multi-count trials. Each count means that he is subjected to detention. Petitioner submits that if the decision of the California Supreme Court were allowed to stand, the prosecutors could circumvent the rule of the *Griffin* case, *supra,* by charging as many separate incidents as possible and then commenting on the failure of the defendant to testify as to all of them. The petitioner did not waive his right to self-incrimination by testifying as to the first two counts because the reasons for the rule of *Griffin* remain. Each count is a crime punishable by a separate sentence. This is not the same as the case cited by the majority of the California Supreme Court where there is comment on the failure to explain a collateral uncharged crime. In that instance there is the defendant taking the stand to testify as to the crime charged. If he can't explain a collateral crime, the comment and instruction are all right because if he is convicted, he is convicted of the crime charged, *not* the thing he failed to explain. If he were tried at a later date on the collateral crime, the prosecutor could not comment on his failure to testify in the separate trial. In the case at bar the result is very much different. The

strong evidence of the first two counts tends to become merged with a weak case on the third and fourth counts, and he is convicted and punished for his failure to testify. If petitioner were charged in this information with practically any armed robbery in the area where similar clothing and gun were used, the comment and instruction allowed and the evidence of counts one and two brought to bear, a conviction would follow. This is the same danger that the *Griffin* case, *supra,* was trying to prevent. That is, that a person can be convicted of a crime by inferences drawn by his failure to testify. In the case at bar, the petitioner was convicted as to Counts Three and Four on the basis of his failure to testify. In effect, he incriminated himself.

The *Griffin* rule is applicable to the present case since this case was on direct appeal. *Tehan* v. *U.S. ex rel. Shott,* 382 U.S. 406, 86 S. Ct. 459, 15 L. Ed. 2d 453.

The case at bar should be reversed since the determination of whether a person takes the stand in a multi-count indictment has been affected by this case. If this case were to stand the privilege against self-incrimination will be abrogated as to charged offenses which the defendant can't explain. The question is why have the privilege? Why can't the defendant explain? The privilege exists first because of the nature of our system. It is accusational, not inquisitional. The privilege exists, second, because even when the Constitution was drafted but possibly more so now a defendant cannot be expected to explain what he was doing on a certain day or why something happened. It should be up to the prosecutor to prove this and not up to the defendants to explain. This is just as important as to each charged crime which is separately punishable

in a multi-count indictment as it is to each separate trial. There is no absolute right to separate trial, but the prosecution should not benefit from inferences available at multi-count trial and not available at separate trials.

The petitioner submits that due to the fact that without the inferences drawn into the case by the comment and instruction, it is unclear that conviction could have been rendered. It should also be emphasized that since the comment and instruction were used that this tainted the convictions under counts one and two just as the comment and instructions tainted the conviction in the *Griffin* case, *supra*. If the case at bar is allowed to stand, the principles announced in *Griffin, supra,* and the privilege against self-incrimination will fall to an effective trial tactic of the prosecutor's in joining as many possible charged crimes together.

3. The Scope of Cross-Examination in Multi-Count Trials.

We reach finally the last area where the petitioner may fall and the prosecutor use what he said or did not say to convict himself. This area is the nature and scope of cross-examination in a multi-count trial. In the leading case, *Caminetti* v. *U.S.*, 242 U.S. 470, 61 L. Ed. 2d 442, 37 S. Ct. 192 the defendant was charged with four crimes. He took the stand and testified as to all crimes but stopped short on certain details. This Court held that when the defendant took the stand he waived his right to incriminate himself and a comment on his failure to explain certain details was permissible. In *Caminetti* this Court said at page 494:

> "Where the accused who takes the stand in his own behalf and voluntarily testifies for himself . . . he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events and already in evidence, in which he participated and concerning which he is fully informed without subjecting his silence to the inferences to be naturally drawn from it."

This Court again in *Johnson* v. *United States,* 318 U.S. 189, 195, 87 L. Ed. 704, 63 S. Ct. 549, held that under federal decision a defendant who takes the stand and testifies in his own behalf waives his Fifth Amendment privilege against self-incrimination at least to the extent of the relevant cross-examination. But the case at bar is distinguishable from the *Caminetti* case, *supra,* and *Johnson* case, *supra,* in that the cross-examination or the inquiry did not at that moment put the accused in jeopardy. In the case at bar if he were asked questions about the charged crimes his answers would be used to convict him. Each crime charged must be proven separately as to all elements. An inference cannot be used as proof of one of the elements of the corpus delicti, so why should an inference from a person's failure to testify be allowed to convict him? The requirements of fair trial may preclude any comment or cross-examination. That is the point in this case: A fair trial as to each crime precludes any comment and also precludes the cross-examination on a collaterally charged crime. A different reason exists for allowing cross-examination of a collateral crime which is relevant and which the defendant is not on trial for since he is not currently in jeopardy for that crime. He is not going to be punished for that crime now by testifying or failing to testify. The prosecution would have to prove an

entire case, establishing each element of the collateral crime and could use the cross-examination at the first trial to convict the defendant. However, the defendant would have the opportunity to rebut the prosecution case without the confusion which surrounds the multi-count trials. He would be able to elect to testify and if he did not do so, then no inference could be raised against him. Why should the functioning of the privilege against self-incrimination be placed in the hands of the prosecutor who by joining various counts could circumvent the privilege if the decision of the Supreme Court of California were allowed to stand. It is not a privilege of the prosecutor but of the defendant and should be only exercisable by the defendant.

Justice Peters in his dissenting opinion of the California Supreme Court Opinion (A-30 to A-35), clearly shows the reasons why questioning as to counts three and four on cross-examination was not relevant or if relevant, not proper in this case. But the rule which the petitioner requests that this Court now establish is even broader than this. In a case such as the one at bar, the defendant should not be considered to have waived his Fifth Amendment privilege against self-incrimination even as to relevant cross-examination when that cross-examination concerns crimes charged at that trial. The defendant should not be placed at the mercy of the prosecutor to explain or try to explain something he may not be able to and be punished by a separate conviction at that time for that testimony. As soon as the cross-examination concerns charged crimes which he has not testified to, there should be a constitutional barrier of the privilege against self-incrimination. In the *Caminetti* case, *supra*, and the *Johnson* case, *supra*, the defendant testified as to all the crimes charged. But here in the case at bar, the defendant chose

not to do so. He should not be convicted because the prosecutor and the instructions spotlighted this fact on counts three and four and was used by the jury to convict the petitioner.

CONCLUSION

The petitioner submits that in a multi-count trial this Court should hold that the Constitutional privilege against self-incrimination prevents cross-examination on crimes which are charged and on which the defendants did not testify. The petitioner believes that if the *Caminetti* case, *supra,* and the *Johnson* case, *supra,* had similar facts to the case at bar that the broad language contained therein would have been modified to this extent. It is our position that in this multi-count trial petitioner did not waive his privilege against self-incrimination as to all crimes charged nor to the extent of relevant cross-examination but only so far as the crimes which he testified to, relevant cross-examination on these crimes and collateral uncharged crimes.

The petitioner's conviction of all four counts charged should be reversed because of the errors in argument by the prosecution and instructions given. The status and organization of the trial evidence by the prosecution tended to confuse the jury as to all counts as can be seen in the verdicts of guilty in counts three and four which should as a matter of law be reversed for insufficiency of the evidence. The instructions and comments of the prosecutor were improper under *Griffin* v. *California, supra,* and the scope of cross-examination in multi-count trials should be limited because of the requirements of the privilege against self-incrimination.

In conclusion, upon the facts and law, it is respectfully urged that this Court grant this Petition for the reason that the petitioner herein has been deprived of his constitutional right not to act as a witness against himself, as protected by the Fifth Amendment and as supplemented by the Fourteenth Amendment to the Constitution of the United States of America.

Respectfully submitted,

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